UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
VELOX EXPRESS, INC.	)	
	)	
Respondent	)	
	)	
and	)	Case 15-CA-184006
	)	
JEANNIE EDGE,	)	
	)	
An Individual	)	

BRIEF OF AMICUS CURIAE
WORLD FLOOR COVERING ASSOCIATION, INC.

Jeffrey W. King, Esq.
J. KING & ASSOCIATES, PLLC
501 Palm Trail
Delray Beach, FL 33483
(561)278-0035

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Counsel for Amici Curiae
World Floor Covering Association, Inc.

The World Floor Covering Association, Inc. ("WFCA") submits this *amici curiae* brief pursuant to the National Labor Relations Board's February 15, 2018 "Notice and Invitation to File Briefs" in the matter of *Velox Express, Inc.*, 15-CA-184006. WFCA opposes expanding what constitutes a violation of the National Labor Relations Act ("NLRA" or the "Act") to make a simple misclassification of a worker as an independent contractor in and of itself a violation. 29 U.S.C. §158(a)(1).

I. STATEMENT OF INTEREST

The World Floor Covering Association, Inc. ("WFCA") submits this *amici curiae* brief pursuant to the National Labor Relations Board's February 15, 2018 "Notice and Invitation to File Briefs" in the matter of *Velox Express, Inc.*, 15-CA-184006. WFCA opposes expanding what constitutes a violation of the National Labor Relations Act ("NLRA" or the "Act") to make a simple misclassification of a worker as an independent contractor in and of itself a violation. 29 U.S.C. §158(a)(1).

The WFCA is a national trade association organized under section 501(c)(6) of the Internal Revenue Code. 26 U.S.C.§501(c)(6). WFCA's members include flooring retailers, commercial contractors, restoration contractors, and inspectors.[1] WFCA members operate over 1,130 retail-flooring stores nationwide. National statistics indicate that the average retail-flooring store is a small business. According to the most recent North American Industry Classification System (NAICS) report from the Census Bureau, there were 14,031 retail-flooring firms in

[1] The WFCA membership also included flooring manufactures, flooring distributors and other companies involved in the flooring industry as associate members.

2015.[2] Revenues for the industry were $19.754 billion in 2016, the last year in which a full report is available.[3] Applying those statistics, the average retail-flooring store had total sales of $1,407.883 in 2016. The vast majority of flooring retailers contract with independent contractors to install the flooring they sell.

WFCA also has an installer division, the Certified Flooring Installers ("CFI. The CFI Division conducts educational programs and certifies installers. Over the years, CFI has trained and certified over 30,000 installers. The vast majority of CFI installers, like many installers, are small businesses operating as independent contractors. According to the 2015 NAICS report, there were 14,435 flooring contractors with 96% having twenty (20) or fewer employees.[4]

WFCA's members will be adversely impacted by the proposed change in law adopted by Administrative Law Judge Amchan in his decision in *Velox Express, Inc*. The standards to classify workers as independent contractors and the application of those standards vary by federal agency and cause great confusion. To hold that a simple misclassification violates Section 8(a)(1) of the NLRA would impose strict liability on companies that have applied the standards in good faith, and turn a simple disagreement on the classification into a *per se* labor violation. The ALJD, if upheld by the National Labor Relations Board, would fundamentally change the legal underpinnings of existing relationships between WFCA members and their contractors, and limit the opportunities for flooring installers to establish small businesses.

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2 U.S. Census Bureau, NAICS code 442210 (Floor Covering Stores) *Number of Firms, Number of Establishments, Employment, Annual Payroll, and Estimated Receipts by Enterprise Employment Size for the United States, All Industries: 2015*.

3 *Id*.

4 U.S. Census Bureau, NAICS code 238330 (Flooring Contractors) *Number of Firms, Number of Establishments, Employment, Annual Payroll, and Estimated Receipts by Enterprise Employment Size for the United States, All Industries: 2015*.

II. SUMMARY OF THE CASE

This case involves an unfair labor practice charge filed by an individual worker, Jeannie Edge ("Edge") against Velox Express ("Velox" or the "Company." *Velox Express, Inc.*, 15-CA-184006, 2017 WL 4278501, at slip op. 3 (Sept. 25, 2017). Velox operates a courier service that collects medical samples from different facilities, such as doctor's offices and hospitals, and delivers the samples to a diagnostic medical laboratory. *See Id*. at 2. Velox contracted with drivers, including Edge, to pick up and deliver the medical samples.

Edge filed a charge with the Board after Velox terminated her contract. The NLRB General Counsel alleged that Velox violated Section 8(a)(1) of the Act, among other claims, misclassifying its drivers as independent contractors. Id. On September 25, 2017, the ALJ issued his decision finding that only the misclassification itself was an unfair labor practice, rejecting the other claims. *See Id.* at 14. Velox filed exceptions with the Board, which remain pending.

III. ARGUMENT.

The decision of Administrative Law Judge Arthur Amchan in the matter of *Velox Express, Inc.*, 15-CA-184006, 2017 WL 4278501 (Sept. 25, 2017) (herein "ALJD") to adopt the former NLRB General Counsel's novel theory that an employer's misclassification of employees as independent contractors in itself violates the NLRA is a significant departure from the current standard that has governed for approximately 70 years. The ALJD would alter the well-established elements of a labor violation, would change the burden of proof, and is inconsistent with the statutory language and history of the NLRA. These arguments are fully developed in Respondent's and other *amici curiae* briefs. *See, e.g. Brief In Support Of Exceptions To The National Labor Relations Board On Behalf Of Respondent Velox Express, Inc.*, at pp. 46-48; *Reply In Support Of Exceptions To The National Labor Relations Board On Behalf Of*

Respondent Velox Express, Inc., at pp. 7-8; *Brief Of Amicus Curiae Coalition For A Democratic Workplace And Chamber Of Commerce Of The United States Of America*, at pp. 5-13.

WFCA supports but will not repeat those arguments in this submission. Rather, WFCA will address: (A) The impracticality of creating a *per se* labor violation or misclassification of an independent contractor given the lack of uniformity in the standards and applications of those standards for determining whether a worker is an employee or independent contractor; and (B) The likely impact of the ALJD to deter the establishment of small businesses.

A. Making Misclassification a "Standalone" Unfair Labor Practice Ignores the Uncertainty in the Standard and its Application.

There are few issues that cause more confusion and inconsistent results than determining who qualifies as an independent contractor. The problem is that there is not a single all-encompassing standard for defining who is and who is not an independent contractor. Just to comply with the federal standard, an employer must meet the Internal Revenue Service ("IRS") Right to Control Test, the common law Right to Control Test used to enforce the Employee Retirement Income Security Act (ERISA) and the federal discrimination law, the modified Treasury version of the common law Right to Control Test used for Affordable Care Act purposes, the Economic Realities Test used by the Wage and Hour Division to enforce the Fair Labor Standards Act, and the NLRB hybrid test, which has changed over the years. *See FedEx Home Delivery*, 361 NLRB No. 55 (Sep. 30, 2014) (adding an eleventh factor to its previous list of ten factors). Moreover, the determination by one agency will not necessarily apply to another agency's determination. A company may follow all the rules established by the Department of Labor ("DOL") Wage and Hour Division only to be told its independent contractors are in fact employees under the NRLA.

While the Board's standard for determining independent contractor classification is beyond the scope of this brief, the difficulty in applying the standard and the inconsistent results illustrates that classification decisions should not be the basis for a freestanding unfair labor practice. To illustrate, compare the ALJD determination in this matter, finding that the couriers that collected and delivered medical samples were employees, to the decision in *Dalton V. Omnicare, Inc*., 138 F.Supp.3d 709 (N.D. W.Va. 2015). The case involved the classification as independent contractors of drivers for a courier service that picked up and delivered pharmaceuticals. The District Court found it could not grant summary judgment that the independent contractors were misclassified. *Id*. at 712-13. In fact, a jury subsequently ruled the drivers were not employees, but properly classified as independent contractors. *See* https://www.law360.com/articles/1017643/jury-says-omnicare-didn-t-misclassify-drivers-in-flsa-suit (March 1, 2018).

Another example is the comparison of how the courts have decided whether Uber drivers are employees or independent contractors. A Federal District Court in Pennsylvania found that Uber delivery drivers were properly classified as independent contractors, while a Federal District Court in California ruled the drivers were employees. *Compare*, *Razak v. Uber Technologies Inc*, Case No. 2:16-cv-00573 (E.D. PA July 21, 2016), *with Yucesoy v. Uber Technologies, Inc. et al,* Case No. 4:15-cv-00262 (N.D. CA March 19, 2015). The Board need look no further than the ALJD here. The ALJ relied on the National Labor Relation Board's ("Board") decision in *FedEx Home Delivery*, 361 NLRB No. 55 (2014) finding that drivers were employees, ignoring the D.C. Circuit decision in *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) that rejected the Board's approach.

The ALJ recognized the difficulty of properly classifying employees finding that "often the line between 'employee' and 'independent contractor' is a fine one." ALJD at p.8. To hold that a simple misclassification violates Section 8(a)(1) of the NLRA would impose strict liability on companies that have applied the standards in good faith, and turn a simple disagreement on the classification into a *per se* labor violation. Should Respondent Velox in the case before the Board be considered to have committed a labor violation by classifying its drivers as independent, while Omnicare would not be in violation of the Act for the classification of its drivers as independent contractors as upheld in by a jury in West Virginia.

Even if the Board decided that the Omnicare drivers should be classified as employees under its independent contractor standard for future actions, it could not carry its burden to show that Omnicare took any coercive act or conduct in violation of Section 8(a)(1) of the Act by relying on a prior decision that the drivers were independent contractors. In fact, Omnicare would risk commit an unfair labor practice if it tried to force its drivers that have already been held to be independent contractor to join a union. See 29 U.S.C. § 158(b)(4)(ii); *accord*, *Wilson & Co. Inc.*, 143 NLRB 1221, 1226 (1963) (Union cannot attempt to require self-employer operators to join a union or any other labor organization).

Given the standards for classifying independent contractors are subject to fair interpretation and often result in inconsistent findings, the Board should not make a company's honest mistake in classifying a worker as independent an automatic unfair labor practice. Finding that a simple misclassification would in and of itself be a violation of the Act without any further evidence of intent would essentially eliminate the requirement of any coercive act or conduct for an unfair labor practice.

B. Upholding the ALJD Will Inhibit the Development of New Small Businesses.

The test articulated by the ALJ will chill and likely shrink the number of businesses who may otherwise engage in valid contractor relationships. This in turn, will limit the opportunities for workers to establish their own businesses and contract as independent contractors to provide their services.

In the flooring industry, like many others, a skilled worker will set him or herself up in business. A flooring installer, for example, will often start as a small business offering his or her services to building contractors and agreeing to install flooring sold at local retail stores. Many of these installers grow their businesses to include multiple crews of installers and even branch out into other businesses. Mr. David's Flooring International LLC is a good example of entrepreneurial opportunity that independent contractor have to grow a business. The company was started by brothers installing residential floors as independent contractors. Over the years it grew to nine locations handling everything, from design, project budgeting to distribution and installation of flooring. *See* https://www.mrdavids.com/about/.

Another good example is Robert Varden, who began his career as an installer. He eventually went out on his own and opened Advanced Carpet Concepts and specialized in the installation of flooring on large commercial projects. He eventually sold to the Orcon Corporation. A number of years later, Varden opened Advanced Flooring Technology, a commercial workroom and technical services facility, offering a variety of installation, training, and sales services. *See* https://www.floortrendsmag.com/articles/94690-robert-varden-named-cfi-executive-director.

The flooring industry is filled with similar stories and similar stories can be found in many other industries. Each was the result of the opportunities provided by companies hiring

independent contractors. These entrepreneurial opportunities will likely be limited in the future if the Board follows the ALJD and makes the classification of a worker as an independent contractor if the Board disagrees with the designation. In other words, the law will no longer allow for good-faith mistakes or legitimately close calls. There will only be strict liability that will significantly restrict the number of businesses willing to accept the risk of using independent contractors. The NLRA was never meant to restrict workers' opportunities or inhibit the development of new businesses. To the contrary, the Act was intended to eliminate these kinds of "obstruction[s] to the free flow of commerce" that the adopting the ALJD will create. *See* 29 U.S.C. § 151 et seq.

IV. CONCLUSION

For the foregoing reasons, the *amici curiae* WFCA respectfully request that the Board reject the position that a respondent violates Section 8(a)(1) of the Act solely by misclassifying an employee as an independent contractor.

Respectfully submitted,

/s/ Jeffrey W. King
Jeffrey W. King
J. KING & ASSOCIATES, PLLC
501 Palm Trail
Delray Beach, FL 33483
(561)278-0035

Counsel for Amici Curiae
World Floor Covering Association, Inc.